service on the defendants on the ground that, at this very preliminary stage of the lawsuit, accepting the allegations in the complaint as true, the court could not say that the plaintiff's "false arrest claims are barred by *Heck*." *Id.* at 614.

On the other hand, in a case where the issue was directly presented, the Eighth Circuit followed the majority rule. Thus, in *Anderson v. Franklin County*, 192 F.3d 1125, 1131 (8th Cir. 1999), the court affirmed the district court's dismissal of a false arrest claim where the plaintiff had made no showing that his conviction or sentence had been rendered invalid. *Id.*

The Eleventh Circuit has followed a similar trend. In an early case, *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995), the court made the conclusory footnote statement, that a plaintiff's civil action was not barred by *Heck* in light of "such doctrines as inevitable discovery, independent source, and harmless error." This statement, however, was *dicta*, as it was irrelevant to the only question presented to the court for review: whether the district court was correct to dismiss the plaintiff's Fourth Amendment claim on *Rooker-Feldman* grounds. When the issue was central to a case, the Eleventh Circuit held that a district court erred in finding a plaintiff's search and seizure claims barred under *Heck* when the circumstances surrounding the plaintiff's convictions were unknown from the record. *Hughes v. Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003). In so doing, the court adopted the majority approach. Since, under *Heck*, because "*some* Fourth Amendment claims . . . if successful, necessarily imply the invalidity of the conviction," the court concluded that it must "look both to the claims raised under § 1983 and to

the specific offenses for which the § 1983 claimant was convicted." *Id.* at 1160 n.2 (emphasis supplied in original).[2]

The Tenth Circuit, though characterized by petitioners as having adopted a per se rule, has qualified its ruling suggesting that *Heck* does not delay accrual of Fourth Amendment claims. In the case cited by petitioners, the court stated the well-accepted general rule that "[c]laims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are *presumed* to have accrued when the actions actually occur." *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558 (10th Cir. 1999) (quoting *Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991)) (emphasis added). In *Beck*, the court found no "allegation or information indicating that we should not apply this presumption here" and concluded that the plaintiff's cause of action accrued at the time of his arrest. *Id.* Importantly, the court confirmed that it was not adopting a blanket rule and noted that it was not presented "with the rare situation . . . where all evidence was obtained as a result of an illegal arrest." *Id.* at 559 n.4.[3]

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[2] The Eleventh Circuit's more recent, unreported decision in *Wallace v. Smith*, 145 Fed. Appx. 300 (11th Cir. 2005), does not, as petitioners would have it, "reaffirm" prior Eleventh Circuit precedent. While the *Wallace* court did reverse a finding that a Fourth Amendment claim was barred by *Heck*, it did so upon citation to *Hughes*, 350 F.3d at 1160, a case where the court adopted the majority case-by-case approach. An internal conflict arising out of an unreported decision's incorrect analysis does not call for this Court's intervention.

[3] Whether such a situation is a "rarity" is open for debate. Regardless, as explained by the court below, these are exactly the circumstances presented in this case. App. at 43a (citing *Covington*, 171 F.3d at 123) (where the only evidence supporting the conviction is tainted by a possible constitutional violation that is the subject of a § 1983 action

(Continued on following page)

The First Circuit's position on the *Heck* delayed accrual rule is similarly qualified. In *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001), the court held that, for purposes of that case, claims "based on the officers' physical abuse or arrest of the [plaintiffs] accrued at the time that those events occurred." The court made clear, however, that it was dealing with the "mine-run" and acknowledged that "there may be rare and exotic circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." *Id.* at 52 n.4 (citing *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4-5 (1st Cir. 1995) (Lynch, J., concurring)).

There is no circuit split requiring review by this Court. The Seventh Circuit is firmly aligned with the majority approach. The Eighth and Eleventh Circuits have issued decisions that have not explicitly confronted the question of how the *Heck* rule applies to Fourth Amendment claims. But, when those courts have actually addressed the issue, they too have followed the majority approach. The First and Tenth Circuits have qualified their rulings and their cases do not address facts presented in this case, where the only evidence supporting a conviction was obtained through the unconstitutional search and there could be no reasons for not suppressing the evidence.

None of the other arguments offered by petitioners on the Fourth Amendment issue warrant a writ of certiorari. First, the assertion that the ruling of the Court of Appeals is in conflict with an opinion of an intermediate appellate

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the "quintessential example of when the *Heck* deferred accrual rule is triggered").

court of New Jersey is hardly consequential. The Supreme Court of New Jersey has not addressed this issue and when it does it may well agree with the Third Circuit. Moreover, different approaches to civil rights claims in state and federal court are often the result of federalism principles and the fact that courts differ in access or procedures that make one more or less plaintiff or defendant oriented on a specific issue is not unusual. *See, e.g., Johnson v. Frankell*, 520 U.S. 911 (1997) (state appellate rules govern on issue of interlocutory qualified immunity appeals in state courts).

Second, the argument that there should be clear and easily applied rules for application of statutes of limitations, ignores the fact that *Heck* itself creates deferral rules for statutes of limitation that inevitably will create some uncertainty. Moreover, there is no indication in the reported cases that the approach adopted by the court of appeals in this case has created problems for parties in this type of litigation.

Third, the claim that this Court's decisions in *Stone v. Powell*, 428 U.S. 465 (1976) and *Spencer v. Kemna*, 523 U.S. 1 (1998) render inoperative *Heck's* general prohibition against civil rights lawsuits where habeas corpus relief is not available was not made in the lower courts and is waived. Even if properly presented the argument that *Stone v. Powell* creates a wholesale exemption of Fourth Amendment claims from *Heck* is tied to the theory that *Heck* is premised solely on the need to prevent the use of §1983 as an alternative to habeas corpus actions. But *Heck* is not so limited and, if *Stone v. Powell*, which was decided

18 years before *Heck* had such an effect, this Court no doubt would have said so in the *Heck* opinion.[4]

The same is true for *Spencer v. Kemna*. For the first time in this litigation, petitioners argue that the concurring and dissenting opinions in *Spencer* provide support for their interpretation of *Heck*. But whatever issues are now open as a result of *Spencer* (and that case involved a plaintiff whose conviction in state court was still in place), this Court should resolve those issues in a case where they have been raised and decided in the lower courts.

The policy arguments made by petitioners demonstrate the significant weaknesses of their approach. Petitioners claim that the fact-based rule will lead to intrusions into state court and prosecutorial files. In fact, the opposite is more likely to be true and there is no evidence that the lower courts have had any difficulty in deciding these issues without intrusive discovery or other procedure.

Under the deferred accrual rule, there will be no civil rights action until (and unless) the state court criminal proceedings are resolved in the plaintiff's favor. In these cases, as is true in the case at bar, there will be *no* intrusion into the state proceedings and the federal courts will be able to determine whether the doctrines cited in *Heck's* footnote 7 would be relevant. By contrast, if petitioners' view were to prevail, *almost every* criminal defendant who

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[4] Petitioners also claim that *Nelson v. Campbell*, 541 U.S. 637 (2004) supports the argument for an "expansive" interpretation of footnote 7. But *Nelson* was decided on the theory that the claim (method of execution) sounded entirely in civil rights and had no habeas corpus implications.

believed that his Fourth Amendment rights were violated would have to file suit during the pendency of his criminal proceedings or even after conviction. This regime would surely be far more intrusive into state proceedings. Not only would the number of cases substantially increase, but discovery requests and other proceedings in the federal case would implicate police and prosecutorial files. Petitioners appear to reject the approach taken by some federal courts in staying the civil proceedings pending resolution of the criminal charges, Petition at 14, as one that both "delays and enhances uncertainty" or avoids the intent of *Heck's* footnote 7. But if petitioners are correct, the civil rights cases that they now demand be filed while state criminal proceedings are ongoing will either by highly intrusive (if not delayed by stays), or subject to the same kinds of delays that petitioners lament in their criticism of a fact-based approach.

The central point is that this Court need not ponder these points at this time since there is no indication that the fact-based approach has caused any of the problems that the petitioners' hypothesize.

B. The Court of Appeals Properly Ruled That The Delayed-Accrual Rule of *Heck* Applies to Claims of Racially Selective Law Enforcement Practices

The Court of Appeals unanimously ruled the claim that respondent was detained, arrested, searched and prosecuted in violation of the Equal Protection Clause of the Fourteenth Amendment would necessarily imply the invalidity of his conviction. Petitioners assert that certiorari should be granted on this issue to "clarify" the reach of footnote 7 of *Heck*. But no clarification is needed as no lower federal court has ruled contrary to the decision

below. Moreover, the reasons now asserted by petitioners for review in this Court were not argued below and are plainly tangential to the issue decided by the Third Circuit.

Petitioners seek to equate Fourth and Fourteenth Amendment claims, but the elements of a valid Equal Protection claim – that the criminal investigation and charges were motivated by racial animus – "necessarily imply the invalidity of [the] conviction or sentence," *Heck* at 486-87 (emphasis added), because proof of the violation requires dismissal of the charges. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Unlike Fourth Amendment claims, there can be no issues of harmless error, independent source, or inevitable discovery. Under the *Heck* doctrine, claims that are even indirectly inconsistent with a conviction, such as a *Brady* claim for suppression of exculpatory evidence, are tolled pending the criminal process. A successful *Brady* claim does not mean that the defendant cannot ultimately be convicted, but it does imply the invalidity of the conviction. Here, there is a direct contradiction of the conviction since a proven selective enforcement or selective prosecution claim mandates dismissal of the charges, and not merely a new trial.

In this case, the fact that the state criminal conviction was invalid as a result of selective enforcement of the laws could not be clearer. The specific grounds cited by the state courts in reversing plaintiff's conviction was proof of "racial profiling" by the New Jersey State Police. It cannot be that a civil rights claim based on equal protection principles arising from a state court determination reversing a criminal conviction because of selective enforcement of the laws does not by its very nature imply the invalidity

of the state criminal process and the conviction. As the court stated in *State v. Kennedy*, 247 N.J. Super. App. 21, 588 A.2d 834, 839 (1991), "It is morally incongruous for the state to flout constitutional protections and at the same time demand that its citizens obey the law." Indeed, under the rule proposed by petitioners, the validity of *Heck* itself would be called into question. If a racial selective prosecution claim did not imply the invalidity of the conviction, it is difficult to know which constitutional claims would fit this category.

In this Court, for the first time in this litigation, petitioners argue that because this Court has not definitively ruled whether the remedy for racially selective law enforcement measures should be suppression of evidence or dismissal of criminal charges, the Court should use this case as a vehicle to decide that issue and then, if suppression is the proper remedy, to extend petitioner's reading of footnote 7 to these claims. There are several compelling reasons for the Court not to go down this road in this case. First, as discussed, whatever this Court might say as to the appropriate remedy for Fourteenth Amendment selective enforcement claims, the New Jersey courts were clear that the remedy is dismissal of the charges. Under *Heck*, that is the end of the inquiry since plaintiff's claim undoubtedly would imply the invalidity of his conviction.

Second, none of the arguments now made by petitioners were made in the court below and therefore are waived. In the court of appeals, petitioners argued that the selective enforcement claim was limited to the stop of the car (and not to the detention, search and arrest of plaintiff). The Complaint makes clear, however, that the entire process was motivated by racial animus.

Third, the issue of what is the appropriate remedy for a selective enforcement claim should be decided in a case that directly presents that issue. Here, the issue was not argued in the lower courts and, given the rationale of *Heck* and the dispositive rulings of the New Jersey courts, the remedial issue is simply not presented.

Finally, even if this Court reached out to decide this issue in this case, and determined that suppression was the appropriate remedy, the result would be no different. The issue then would be whether there could be any grounds to deny suppression and in this case, no exceptions to a suppression remedy could be asserted under state or federal law.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiori should be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly,

Petitioners,

v.

Emory E. Gibson, Jr.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' SUPPLEMENTAL BRIEF CALLING ATTENTION TO A NEW CASE PURSUANT TO RULE 15.8

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A NEW CIRCUIT COURT CASE NOT AVAILABLE AT THE TIME OF PETITIONERS' LAST FILING SUPPORTS THE NEED FOR REVIEW.

Last week's decision in *Wallace v. City of Chicago,* No. 04-3949 (7th Cir. March 8, 2006) (a copy of the slip opinion is appended to this brief) crystalizes the circuit split on the questions presented and highlights the recurrent nature of the problem and the need for resolution by this Court. The United States Court of Appeals for the Seventh Circuit held that "false arrest claims accrue at the time of arrest." *Id.*, slip op. at 2. The court considered several approaches to determining when false arrest and similar Fourth Amendment claims should accrue, *id.*, slip op. at 6, and concluded that the "clear rule" it adopted was best for policy reasons and most consistent with this Court's opinion in *Heck v. Humphrey*, 512 U.S. 477 (1994). *Wallace*, *supra*, slip op. at 6-11. The court noted the substantial circuit split concerning the accrual issue and observed that "[b]y aligning ourselves with one side of this debate, we do not break any new ground." *Id.*, slip op. at 13. The court advised "[i]ndividuals and attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations [to] file their civil rights action at the time of arrest." *Id.*, slip op. at 10-11.

Because the decision overruled prior circuit precedent, the *Wallace* panel circulated the opinion among all judges of the court in regular active service, and a majority did not wish to hear the case en banc. *Id.*, slip op. at 2. Judge Posner, dissenting from the denial of the rehearing en banc, *id.*, slip op. at 15, would have adopted at most a rebuttable presumption that accrual occurs at the time of the arrest or alleged Fourth Amendment violation. *Id.*, slip op. at 18. The presumption would be rebutted "if, for example, the only evidence of [plaintiff's] guilt was evidence seized in a search that he challenges in his section 1983 suit." *Id.* Acknowledging that his rule would result in some "tough borderline cases," *id.*, slip op. at 19, and that existing circuit precedent is divided into

"two groups," *id.*, slip op. at 22, Judge Posner nevertheless concluded that most of the existing circuit precedent was "consistent," *id.*, and that the rebuttable presumption he proposed was superior for policy reasons and supported by *Heck*. *Id.*, slip op. at 20-23. Judge Posner criticized the court for "creating more work for the Supreme Court, which now faces an intercircuit conflict on a recurrent issue." *Id.*, slip op. at 23.

Concerning the resolution of the questions presented, petitioners endorse the majority decision in *Wallace*, rather than Judge Posner's dissent, but agree with both Judge Posner and the majority that there is an intercircuit conflict on this recurrent issue. This petition affords this Court the opportunity to resolve this recurrent intercircuit conflict on an important issue of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on both of the questions presented.

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Dated: March 16, 2006

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3949

ANDRE WALLACE,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, KRISTEN KATO
and EUGENE ROY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CV 2296—**Samuel Der-Yeghiayan,** *Judge.*

ARGUED MAY 31, 2005—DECIDED MARCH 8, 2006

Before EASTERBROOK, ROVNER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* From the age of fifteen until twenty-three, Andre Wallace was serving time in prison for his alleged participation in a murder. After several appeals, the Illinois Appellate Court found that the police had arrested him without probable cause and that his confession was not sufficiently attenuated from his unlawful arrest. At that point, the prosecution decided to leave well enough alone, and Wallace was released. Only then did Wallace commence the present action: he filed a suit under 42 U.S.C. § 1983 in federal court asserting that Detectives Kato and Roy and the City of Chicago had violated his Fourth Amendment rights and that they had

also committed the state torts of malicious prosecution and false imprisonment. The district court granted summary judgment in favor of all three defendants. We affirm. In doing so, we have found it necessary to clarify the law of our circuit concerning when a false arrest claim accrues. We reaffirm the holding of *Booker v. Ward*, 94 F.3d 1052, 1056-57 (7th Cir. 1996), that false arrest claims accrue at the time of arrest; to the extent that it is inconsistent with *Booker v. Ward* and the present opinion, we overrule *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003).

I

On January 17, 1994, John Handy was shot and killed at 825 N. Lawndale Avenue near the intersection of Chicago Avenue and Lawndale. Handy had been working as a house sitter for a construction company and had apparently had a previous confrontation with drug dealers in the area. Detectives Kristen Kato and Eugene Roy were assigned to investigate Handy's murder. After discussing the murder with witnesses and informants in the neighborhood, the police brought Wallace and Laron Jackson in for questioning on the night of January 19, 1994. At the time, the police were not aware that Wallace was only 15 years old because Wallace had told them he was 17 years old.

During the course of the night, Detectives Kato and Roy took turns interrogating Wallace. Wallace, they claim, was free to leave the station house at any time. Wallace's account is somewhat different: he reported that Kato

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Because this opinion would overrule an earlier decision of this court, in the manner described in Part II.A. below, it has been circulated among all judges of this court in regular active service. A majority did not wish to hear the case en banc. Circuit Judge Posner voted to hear the case en banc for the reasons stated in his dissent.

and Roy played "good cop/bad cop" with him to induce him to confess falsely. Kato was the bad guy; whenever Kato took a break, Roy spoke with Wallace and told him that if he confessed, Roy could get Kato to stop hurting him. This continued through the night. At about 4:15 a.m., the detectives confronted Wallace with Jackson's and another witness's statements that they saw Wallace running down the gangway from 825 N. Lawndale after hearing shots. Wallace then admitted that he was only 15. Around 6:00 a.m., Wallace agreed to confess. A youth officer and an assistant state's attorney met with Wallace and read him his *Miranda* rights and took his written statement. In his complaint, Wallace claims that Kato told him not to tell the state's attorney that Kato had promised Wallace that he could go home after he gave his statement.

Before his trial, Wallace filed several motions to suppress his statements on the grounds that his arrest had been made without probable cause and that the statements were coerced and violated his *Miranda* rights. His motions were all denied. On April 19, 1996, after a bench trial, Wallace was found guilty of first degree murder.

Wallace appealed. In an opinion issued on September 21, 1998, the Illinois Appellate Court found that the police arrested him without probable cause and remanded for a hearing to determine whether his statements were sufficiently attenuated from his unlawful arrest to permit their use. On remand, the circuit court found that Wallace's confession was sufficiently attenuated from his arrest and affirmed his conviction. Wallace appealed again, and the Illinois Appellate Court reversed the circuit court's decision and remanded for a new trial. On April 10, 2002, the prosecution filed a *nolle prosequi* motion and dropped the case.

On April 2, 2003, Wallace filed the present suit, asserting that his Fourth Amendment rights had been violated and

raising state law claims for false imprisonment and malicious prosecution. Kato and Roy filed an answer and a motion for summary judgment, and the City filed a motion to dismiss. On October 21, 2003, Wallace filed his response, just a week before we decided *Gauger v. Hendle*, which held that under the circumstances presented there the statute of limitations did not begin to run until the defendant's conviction was invalidated. 349 F.3d at 361-62.

On March 30, 2004, the district court granted summary judgment for Roy and Kato on all claims except Wallace's federal fair trial claim, which it denied without prejudice. The court also denied without prejudice the City's motion to dismiss under Fed. R. Civ. P. 12(b)(6). Wallace filed an amended complaint on April 28, 2004, reasserting his Fourth Amendment claims. The defendants answered and filed a second motion for summary judgment, which included an affirmative defense of collateral estoppel. Wallace's response asserted that the defendants had waived their collateral estoppel defense by failing to raise it in their answer to his amended complaint. The defendants moved to amend their answer.

On October 29, 2004, the court granted the defendants' motion to amend their answer to assert their collateral estoppel defense and in the same order granted the defendants' motion for summary judgment. It concluded that Wallace had conceded that his false arrest claim was time-barred. Alternatively, the court held that even if Wallace was allowed to replead his claim under the more recent decision in *Gauger*, he would still be time-barred because Wallace could have brought the claim after the Illinois Appellate Court found on September 21, 1998, that Wallace was arrested without probable cause. This was so even though the appellate court remanded the case to the trial court to determine whether Wallace's confession was sufficiently attenuated from his illegal arrest. The district court concluded that at this point it was possible that even

if Wallace was illegally arrested his conviction could still stand, and thus he could not take advantage of the *Gauger* rule.

II

A. False Arrest Claim

Wallace brought his false arrest claim for violation of his Fourth Amendment rights under 42 U.S.C. § 1983. Before turning to the merits of the claim, we address briefly the government's argument that it is waived (or more properly, forfeited) because Wallace failed to raise it in a timely manner in the district court. Our review of the record shows that Wallace initially conceded that his false arrest claim was time-barred in the responsive papers he filed on October 21, 2003, under pre-*Gauger* law. After *Gauger* appeared a week later and before the district court ruled on the defendants' second motion for summary judgment, Wallace changed his position and asserted the merits of the false arrest claim. We therefore conclude that he neither waived nor forfeited this argument below.

Although federal law governs the question of the accrual of constitutional torts, state statutes of limitations and tolling doctrines apply once accrual has been determined. See *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989); see also *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998). Wallace's false arrest claim is subject to the two-year statute of limitations supplied by Illinois law under 735 ILCS § 5/13-202. In his case, that period was tolled until November 7, 1999, two years after Wallace turned eighteen years old, by virtue of 735 ILCS § 5/13-211. If Wallace's claim accrued as of April 10, 2002, when his conviction was finally nullified and the state dropped his case, then the suit filed on April 2, 2003, easily met the two-year deadline. If, on the other hand, his claim accrued at the time of his

arrest on January 20, 1994, his claim is time-barred, even taking into account the tolling that occurred during the period of his minority. Everything depends, therefore, on the accrual rule we must use.

In principle, there are at least three approaches we could take to the accrual of Fourth Amendment claims: (1) the Fourth Amendment claim arises at the time of the wrong (*i.e.*, the false arrest, the unlawful search); (2) the Fourth Amendment claim accrues only after the underlying conviction definitively has been set aside; or (3) as *Gauger* suggested, accrual depends on how central the evidence was to the conviction: if it was non-essential, use rule 1; if it was critical, use rule 2. Before settling on our preferred option, it is useful to review the underlying law in this area.

When a person's Fourth Amendment rights have been violated by a false arrest, the injury occurs at the time of the arrest. Thus, an individual is entitled to recover only for injuries suffered from the time of arrest until his arraignment. *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004) ("[W]e have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment."); see also *Gauger*, 349 F.3d at 363 ("[T]he interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects."). On the other hand, as Wallace's own case illustrates, it is often the case that the prosecution cannot proceed without the fruits of an unlawful arrest (as Wallace's confession was) or an unlawful search. In those cases, the idea that the claim accrues at the time of the injury runs into some tension with the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck*, the Court held that a constitutional claim that would undermine a criminal conviction if vindicated cannot be brought until the defendant's conviction is nullified. *Id.* at 486-87. This general rule, which works perfectly well for complaints like the ones about the knowing destruction of